IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MATTHEW SCIABACUCCHI, on behalf of himself and all others similarly situated,	:	
Plaintiff,	:	
v.	:	C.A. No. 2017-0931-JTL
MATTHEW B. SALZBERG, JULIE M.B. BRADLEY, TRACY BRITT COOL, KENNETH A. FOX, ROBERT P. GOODMAN, GARY R. HIRSHBERG, BRIAN P. KELLEY, KATRINA LAKE, STEVEN ANDERSON, J. WILLIAM GURLEY, MARKA HANSEN, SHARON MCCOLLAM, ANTHONY WOOD, RAVI AHUJA, SHAWN CAROLAN, JEFFREY HASTINGS, ALAN HENRICKS, NEIL HUNT, DANIEL LEFF, and RAY ROTHROCK,	:	
Defendants, and	:	
BLUE APRON HOLDINGS, INC., STITCH FIX, INC., and ROKU, INC.,	:	
Nominal Defendants.	:	

Chancery Courtroom No. 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, September 27, 2018
2:00 p.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

- - -

ORAL ARGUMENT RE CROSS-MOTIONS FOR SUMMARY JUDGMENT

CHANCERY COURT REPORTERS
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THE COURT: Welcome, everyone.

MR. CHANDLER: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. CHANDLER: I thought what we might do is I would introduce my guests first to the Court, and then Ms. Dearlove can introduce her guests and Mr. Heyman can introduce his guests.

THE COURT: That's fine. Thank you.

MR. CHANDLER: So accompanying me at my table are my colleagues from near and far, Mr. Berger --

MR. BERGER: Good afternoon, Your Honor.

MR. CHANDLER: -- Mr. Sorrels --

MR. SORRELS: Good afternoon, Your Honor.

MR. CHANDLER: -- and Ms. Faccenda.

MS. FACCENDA: Good afternoon, Your Honor.

THE COURT: Thank you all for being here.

MR. CHANDLER: And shadowing us in the back is Mr. Berni.

MR. BERNI: Good afternoon, Your Honor.

THE COURT: Welcome. Thank you.

MS. DEARLOVE: Good afternoon, Your Honor. Catherine Dearlove from Richards, Layton & Finger for the Blue Apron defendant. Here today with me at counsel table is Michael Bongiorno from WilmerHale, Tim Perla, also from WilmerHale, and from Blue Apron, Seth Skiles.

THE COURT: Thank you all for being here. I appreciate you coming.

MS. DEARLOVE: Thank you.

MR. HEYMAN: Good afternoon, Your Honor. May I introduce Joel Fleming and Jason Leviton from Block & Leviton in Boston, our co-counsel; and then from my firm, Melissa Donimirski and Aaron Nelson. And Mr. Fleming and I arm wrestled, and I lost, so he gets to do the argument today.

THE COURT: All right. Thank you all for being here as well.

MR. HEYMAN: And former Chancellor Chandler and I discussed the order today, and we both thought it would make sense for plaintiff to go first, unless Your Honor has some other preference.

THE COURT: That's fine. That's perfectly fine. All right.

MR. FLEMING: Good afternoon, Your Honor. Joel Fleming for plaintiff Matthew Sciabacucchi. This is the time set for oral argument on the parties' cross-motions for summary judgment.

If the Court has particular questions, I'm happy to address them up front. Otherwise, I plan to address three issues in turn.

I'll begin with the question of ripeness. I think it's not the core issue, but it's logically prior. Then I'll turn to the merits, discuss the relevant statutory provisions and the case law, and finally discuss broader questions of public policy.

Although it's not the core issue, I do think that it makes sense to start with ripeness. The Roku and Stitch Fix defendants, of course, concede ripeness. Somewhat ironically, the only defendants who do raise a ripeness challenge are the Blue Apron defendants.

I say ironic because, of course, it's the Blue Apron defendants who are currently defendants in two class actions under the Securities Act: one in

federal court and then more recently, after the briefing concluded, a new Securities Act class action was filed against the Blue Apron defendants in New York State court.

We submitted a letter with that complaint as well as a stipulation. The Blue Apron defendants have agreed with the plaintiff in that matter to stay the state court action pending the resolution of the motion to dismiss in the federal action.

That motion has been fully briefed. I don't believe oral argument has occurred yet. But at some point, that state court action will become unstayed. And I would expect that the Blue Apron defendants will move to dismiss on, among other grounds, subject matter jurisdiction because of the forum provision.

The Blue Apron defendants' primary argument on ripeness is that our client has not alleged that he actually intends to file a standalone action against them. The problem is that this runs right into two recent cases, Solak and Chevron. I think Chevron actually answers it, but I'll start with Solak, which is more recent. Both cases involve forum

provisions where, as here, the plaintiff did not allege any intent to actually file a standalone action.

In Solak, the provision was a forum provision limited to internal claims that also included a provision purporting to shift fees against plaintiffs who filed in the wrong forum. The Court found that that challenge was ripe. Ripeness was actually argued and briefed. It was one of the key issues before Chancellor Bouchard, and he held that the claim was ripe.

The Blue Apron defendants distinguished that case by saying part of the basis for the ripeness finding in Solak was the deterrent effect of the fee-shifting provision. Here, there's no fee-shift, and so there's less of a deterrent.

I'd certainly agree that there would be a greater deterrent effect if the provisions here also included a fee-shifting component, but just standing alone, the forum provision alone is a significant deterrent.

You face the risk that if a claim is filed in state court, it will be removed on the basis of the petition. That causes delays. You have to

move to remand. That can take several months. Then the same question will be litigated again in the state court on remand. The defendants can take another shot at the argument in front of a state court judge, who might misapply Delaware law.

So I do think that there's a deterrent effect, even in the absence of a fee-shifting component.

The bigger problem for the Blue Apron defendants was the Chevron decision. Chevron, of course, the Court is familiar with, involved a forum provision limited to internal corporate claims, and there was no fee-shifting component.

There was no allegation or evidence in Chevron that the plaintiffs intended to file any standalone breach of fiduciary duty action against FedEx or Chevron. The case was focused solely on the forum provision. And nonetheless, then-Chancellor Strine found that the claims were ripe.

I don't see a distinction between that case and this case. The only distinction that the Blue Apron defendants offer is the fact that in Chevron, defendants conceded to ripeness.

The problem is that the parties can't

simply agree to confer subject matter jurisdiction on the Court.

If you look at the very first case that's cited in the Blue Apron defendants' answering brief, it's Stroud versus Milliken Enterprises, a 1989 decision of the Delaware Supreme Court. And at page 408, it says that "in weighing whether the time is ripe for judicial determination, the willingness of the parties to litigate is immaterial." So that distinction is irrelevant.

The parties can't agree to confer jurisdiction on the Court and ask for an advisory opinion on an issue that's not yet ripe.

With that distinction out of the way, there's nothing left to distinguish this case from Chevron. If anything, there's a stronger case for finding ripeness here because of the pendency of the state court action.

Unless the Court has questions on that issue, I'll briefly talk about the one other unique issue that the Blue Apron defendants raise, which they view through a ripeness framework, although I think it's a little distinct, and that's the savings clause that appears in their provision.

This is language that's unique to the Blue Apron defendants' provision. It does not apply in the certificates of incorporation of Stitch Fix or Roku. And the savings clause says that the Blue Apron defendants' federal forum provision is enforceable only "to the fullest extent permitted by law."

I don't have much to add to our papers. Again, I think Solak answers this. There was a similar savings clause in Solak.

The defendants in Solak made the same argument that the Blue Apron defendants are making here. They cited the same case, the Corti decision.

What Chancellor Bouchard said in Solak was he distinguished Corti. He said in Corti, the savings clause actually operated to save something. Per the provision --

THE COURT: Excuse me. That's some strong tea. I'm sorry. Excuse me.

MR. FLEMING: Not at all.

THE COURT: You were talking about Chancellor Bouchard's distinguishing --

MR. FLEMING: It was just such a gripping point.

THE COURT: Took me by surprise.

MR. FLEMING: So Solak specifically distinguished Corti, which is the leading case that the Blue Apron defendants relied on. And it said in this case, Solak -- and the same is true here -- there's nothing to save. The entire provision is invalid, and so the savings clause isn't operating to save anything.

I think the same is true here. In fact, I think the parties would actually agree that there's no way to split the baby here. Either, you know, the defendants are correct and the clause is entirely valid, or we're correct and it's entirely invalid. Either way, I think it rises or falls together.

So if defendants are correct that the clause is entirely valid, we're going to lose anyway. The savings clause doesn't come into it. If we're correct that the clause is completely invalid, then there's nothing to save. And that doesn't defeat the ripeness point, either.

So unless the Court has any other questions on ripeness, I'll get to the heart of the matter.

Assuming the claims are ripe, are the

federal forum provisions valid? They're not. And they're invalid for a couple reasons, but primarily because Section 102's enabling language does not extend beyond internal corporate matters.

I'll focus exclusively on the language of 102 because these are all provisions that appear in the Certificate of Incorporation. I think the same reasoning would apply if these were in the bylaws. But the parties agree that the language of 102(b)(1) and 109(b), there are some differences, but they're getting to the same point. And we agree on that point.

So because the federal forum provisions are not enabled by 102(b)(1), they're beyond the corporation's power to adopt and they're invalid.

102(b)(1) contains generic enabling language about what a charter may include. It may include "Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders" -- it goes on -- "if such provisions are not contrary to the laws of

this State."

This language has never been held to authorize a provision that goes beyond provisions governing the internal affairs of the corporation.

And you can see the importance of the internal affairs dividing line in a couple places. Your Honor's decision in Revlon, which was one of the first cases to talk about forum provisions, was quite specific that it was talking about forum provisions for intra-entity disputes. And you can really see the importance of the internal affairs dividing line in then-Chancellor Strine's decision in Chevron.

I agree with defendants that Chevron does not expressly resolve the question that's presented here, but it's hard to read that opinion and not walk away with the idea that the internal affairs dividing line was a very significant thread running throughout the opinion.

There were six separate references to the doctrine in the opening paragraph alone, and the phrase internal affairs appears 37 times.

In a couple of instances, Chancellor Strine favorably contrasted the Chevron and FedEx provisions, which were limited to internal corporate

claims, with hypothetical forum provision that limited plaintiff's ability to bring claims under the federal securities laws.

Chevron noted that "neither of the forum selection bylaws purports in any way to foreclose a plaintiff from exercising any statutory right of action created by the federal government."

It approvingly quoted a Law Review article, ironically by Professor Grundfest who was an inventor of the federal forum provisions, but an earlier article in which Professor Grundfest stated that forum selection provisions "do not purport to regulate a stockholder's ability to bring a securities fraud claim or any other claim that was not an intra-corporate matter."

You also see the importance of this dividing line, of course, in Section 115, which I'll discuss in a moment. There is significant scholarly authority discussing how Section 102 is limited to intra-corporate affairs. That's at Footnotes 30 and 31 of our answering brief as well as some other places.

Defendants in their answering brief suggest that there's somewhat limited discussion of

this principle in the case law. I think that's just because this is a principle that's so basic and fundamental to the American federalist system of corporate law that it usually goes unsaid.

So it's perhaps not all that surprising that one of the clearest articulations of this rule comes from a speech that Chief Justice Strine gave to a European audience in 2005 where he was explaining the way the American system works.

And he expressed the rule very plainly: "Delaware corporation law governs only the internal affairs of the corporation." That's from -- it was published in the Delaware Journal of Corporate Law, "The Delaware Way." That's at Footnote 29 of our answering brief.

You can also see the importance of this intra-corporate limitation looking at the arguments that defendants do offer. They cite a long, long line of cases with broad language about the expansive nature of Section 102. But as we show in our answering brief, all of those cases are dealing with internal corporate issues.

We're not suggesting that the fact that federal forum provisions are novel means that

they're definitively unauthorized by the DGCL, but I do think that the lack of any prior provision that purports to regulate an external matter is an important data point for this Court to consider.

There are also the two statutory phrases the defendants latch onto, and I don't think either works. The first is the phrase "conduct of the affairs of the corporation." But as we point out in our answering brief, the Supreme Court has interpreted that phrase to mean the conduct of intra-corporate matters. That's the Automatic Steel case.

Defendants have also failed to explain the difference between the phrase "conduct of the affairs of the corporation" and the phrase "internal corporate claim," which appears in Section 115.

The second phrase is "rights of stockholders." But again, that doesn't work. Federal securities claims are not rights and powers of stockholders. They're the rights and powers of purchasers and sellers.

We know this, among other reasons, because the rights don't travel with the shares when a share is sold. A federal securities claim is a personal claim that remains with the person who was

harmed based on their purchase of stock.

Almost by definition, Securities Act claims are going to relate to misstatements that are made before the plaintiff became a stockholder. They are frequently brought by people who have sold all of their shares and are no longer stockholders of the corporation. And they can also be brought by people who were never stockholders at all. Purchasers of debt securities can bring Securities Act claims.

And I think this is an important point, because one of the foundational assumptions that underlies the DGCL's view of the charter and bylaw provisions with the DGCL forming a contract with stockholders is this idea that stockholders have a continuing say in the matter. They still have the ability to exercise those sort of exit, voice, loyalty options.

Chief Justice Strine made this point explicitly in the Chevron decision, pointing out that "because the DGCL gives stockholders an annual opportunity to elect directors, stockholders have a potent tool to discipline boards who refuse to accede to a stockholder vote repealing a forum selection clause ...."

That vote gives stockholders powerful rights that they can use to protect themselves if they do not want board-adopted forum selection bylaws to be part of the contract between themselves and the corporation.

That's a very different model than the scenario where you have Securities Act claims brought by someone who may never have been a stockholder or someone who is no longer a stockholder.

You can also see Securities Act claims against people who we don't traditionally think of as being those who manage the corporation. Claims against underwriters are specifically identified in the statute, claims against auditors, et cetera. Those are people who are supposed to be independent of and outside the corporation.

This reading of Section 102 is confirmed by the language of Section 115. The parties agree that Section 115 confirms Chevron. We agree that it expressly authorizes exclusive provisions for internal corporate claims, and we agree that it does not expressly authorize nor expressly prohibit federal forum provisions.

The key dispute between the parties is

what inference the Court should draw from that silence. As set forth in our papers, we believe that in this instance, silence implies prohibition. And I think the best comparison is to 102(b)(7).

102(b)(7) expressly authorizes provisions that exculpate directors from monetary liability for breaches of the duty of care. It expressly prohibits provisions that exculpate directors from monetary liability for breaches of the duty of loyalty, and it is silent about provisions that exculpate officers or aiders and abettors.

Both this Court and the Supreme Court have looked to the text of the statute and have concluded that the silence in 102(b)(7) with respect to officers and aiders and abettors means prohibition. The Court should reach the same result here.

Defendants' only response to the 102(b)(7) argument is that 102(b)(7) is somewhat unique. They say, Yes, silence means prohibition in the context of 102(b)(7), but that's only because there are these background common law fiduciary principles that would bar an exculpatory provision in the absence of 102(b)(7)'s express authorization. A couple problems with this response.

The first is that I don't think it's an accurate description of what the background common law fiduciary principles actually are. This is the second supplemental submission we made. It was in a letter on Friday. And we submitted a Law Review article by former Chief Justice Veasey as well as the Brazilian Rubber case, a 1911 decision of the English Court of Chancery.

And what the Law Review article and the English case say are that in that interim period between Van Gorkom, the D&O liability insurance crisis, and the adoption of 102(b)(7), this was a live conversation. And there was a significant view that even in the absence of 102(b)(7), it would be appropriate for a corporation to adopt a provision authorizing exculpatory provisions. The Brazilian Rubber case says that pretty explicitly.

More importantly, this interpretation of 102(b)(7) where you're grafting on the text of the statute against background common law fiduciary principles is not how Delaware courts interpreting the statute have actually reached their decision.

For example, Your Honor's decision in Rural Metro, which was expressly affirmed on this

point by the Supreme Court, emphasized that it was looking to the literal language of the statute, and that this was a textual reading. No discussion of background common law principles. And I think that's the same way that the Court should approach this question here.

I'd also briefly point out, and this is the third piece of our supplemental submission, that this isn't some historical quirk unique to Section 102(b)(7). Section 145 works the same way.

Subsections (a) and (b) expressly authorize broad indemnification provisions if the person acted in good faith. There is no express prohibition on indemnifying someone who did not act in good faith. And indeed, Subsection (f) says that the indemnification provisions authorized by (a) and (b) "shall not be ... exclusive."

Nonetheless, the Court has read (a) and (b)'s silence as to indemnification of people who did not act in good faith to mean prohibition. And that's the Sun Media case at Footnote 93 provided in our letter.

The last thing I'll say about Section 115, defendants place some emphasis on the council

memo that's at Tab 7 of the compendium submitted with their answering brief as a guide to the legislative history. Both parties have discussed the synopsis. I don't think it's actually much help.

The one sort of overall takeaway from the legislative history is the reference to confirming the holding of Chevron. We, of course, think that Chevron supports our position. Defendants think that Chevron supports their position.

Ultimately, I think it depends on how the Court reads Chevron or perhaps what the Court thinks the authors of the council memo thought Chevron meant. But either way, I don't think it's particularly illuminating.

I would note, though, that the council memo does highlight the public policy, what we've called the stay-in-your-lane policy that was discussed at length in our brief at page 6.

The council memo notes that if Delaware oversteps its bounds, there's a concern that other regulators would likely feel compelled to step in. The federal government might perceive a need to occupy the field of corporate law in order to maintain this critical aspect of the national and world

economy. So I think that policy was a live issue and a live concern in the minds of the people who were drafting the statute.

So that seems like a natural segue to turn to the broader considerations of public policy, unless the Court has questions on the statute or the cases.

So the policy is relevant. I mean, it's in the text of 102(b)(1) that a provision can't contradict Delaware law. There are also, of course, cases saying that a charter may not contain a provision that transgresses a public policy settled by the common law or implicit in the General Corporation Law itself.

I think the parties agree on that point, and I think the parties also agree that this stay-in-your-lane policy does exist.

Where the parties ultimately join issue is the question of whether the federal forum provisions in fact take Delaware out of its lane and risk provoking a conflict with the federal scheme.

And the reason that we think that there is a conflict with the federal scheme is if you look at the text of the Securities Act, Section 22(a),

it says two things.

It says, first, that there is concurrent jurisdiction for claims under the Securities Act, both federal and state courts. In itself, that's not unusual. Frankly, I think the background rule is if it's silent, there is concurrent jurisdiction, but it was less settled in 1933.

But it also contains a very unusual provision, which is the antiremoval provision. And that says that if a Securities Act claim is filed in state court, it may not be removed to federal court. That's extremely unusual, and I can't think of an example in another statute where you see something like that. I think it's a strong indicator that there is a strong federal policy that wants plaintiffs to have a broad choice of forum for these claims.

We also look to Cyan, which is a unanimous decision of the United States Supreme Court earlier this year, affirming that that rule, the Anti-Removal Rule and Concurrent Jurisdiction Rule were left unchanged by the Securities Litigation Uniform Standards Act of 1998, which was a statute that otherwise quite carefully removed state court jurisdiction over a broad variety of claims that were

sort of generically in the federal sphere.

So defendants' primary response is that neither the Securities Act nor Cyan preempts or otherwise expressly forbids the federal forum provisions.

One difficulty with this, of course, is that there have been a handful of federal decisions interpreting identical provisions: The Snap cases and the Tintri cases that are cited in our papers. So there has already been some hostility from the federal Bench to these provisions.

But more importantly, Delaware's stay-in-your-lane policy is about much more than simply following the Supremacy Clause and declining to adopt laws or interpret statutes in a way that leads to actual preemption.

What the stay-in-your-lane policy is about is to avoid inviting a change in federal policy, whether that's a new law adopted by Congress, a change in regulations adopted by the SEC, or just a change in practice adopted by the SEC.

The concern being that if Delaware veers across that yellow line and starts to veer into the federal sphere of regulating fair disclosure in

securities markets, that that will provoke a reaction from the federal government that will lead to increased federalization of areas that have traditionally been considered part of Delaware's sphere.

Delaware has consistently and carefully responded to those threats of potential federalization by staying in its lane, focusing on intra-corporate matters, and leaving the regulation of federal securities questions to the federal government. It's a wise course that has served Delaware well, it's served Delaware corporations well, and it's served investors well. And I think the Court should continue to follow that path today.

If the Court has additional questions, I'm happy to answer them. Otherwise, I don't have anything else.

THE COURT: Thank you.

MR. FLEMING: Thank you.

MR. CHANDLER: Good afternoon, Your Honor. I'm William Chandler of Wilson Sonsini Goodrich & Rosati on behalf of the Roku and Stitch Fix defendants.

Your Honor, I want to address mainly

the four points that my friends have just mentioned to you today. I'm going to start with the statutory provision, Section 102. I'm going to move from that to what I think is the correct reading of Chevron. And from there, I'm going to also talk about why I believe 115 is not helpful in answering the question before the Court today. And then I'm going to end by taking up this last challenge, the stay-in-your-lane policy argument.

Now, of course, I'd be happy to answer any questions Your Honor has, but that's kind of my agenda and the order in which I intend to approach it.

So starting with number one, our papers made clear, Mr. Fleming has just made clear, that the proper analysis for this Court begins and ends with the language of Section 102(b)(1).

And again, to orient Your Honor to the language that I'm sure Your Honor has memorized by this point, that section provides that corporate charters may contain "any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of

the stockholders ... if such provisions are not contrary to the laws of this State."

Now, a few aspects of that language I think are important to focus on. One is the provision "any," the language "any provision."

As we noted, and as Delaware courts have said in legions of cases, and some of which Your Honor has written, that language is extremely broad. It's referred to as a broadly enabling statute. The legislature clearly intended to allow corporations to adopt charter provisions on a wide range of topics, in keeping with Delaware's strong public policy of allowing corporations to privately order their affairs.

Another aspect of that same statute is that by its terms, it has only one express limitation. That charter provisions must not be contrary to the laws of this state, Delaware. For the reasons explained in our briefing and as I'm going to explain in a second, the federal forum provisions simply do not run afoul of Delaware law.

Now, we agree with the plaintiff that Section 102(b)(1), although broad and enabling, isn't unlimited. But again, it's important to examine the

language of the statute to determine what falls within its ambit.

Under that language, charter provisions can regulate the manner in which corporate affairs are conducted, the management of the business, and the powers of stockholders. This includes the manner in which stockholders may pursue their rights.

In our view, the federal forum provisions do precisely that. They relate to the affairs of the corporation and the management of the business, in the sense that they regulate Securities Act claims that are frequently brought following an IPO and funnel or channel those claims to the United States federal courts, where they can be heard more efficiently.

In that sense, the provisions serve the same purpose, the very same purpose, as the Chevron bylaws: to address the prolixity of stockholder litigation in multiple forums. They regulate the manner in which stockholders may vindicate Securities Act claims, which necessarily arise from their stock ownership.

And we note that the plaintiff agrees that standing under Section 11 of the 33 Act is tied

to tracing his shares as a stockholder, thus conceding that standing flows from his status as a stockholder. That's at page 12 of their opening brief.

So debtholders, Your Honor, wouldn't be implicated or affected at all by this forum provision, to begin with.

Now, importantly, just like the provisions at issue in Chevron, the federal forum provisions do not purport to restrict a stockholder's substantive rights. Rather, they merely regulate where Securities Act claims may be pursued. They are procedural in nature.

The plaintiff, however, takes an unnecessarily restrictive view of Section 102(b)(1). He uses the shibboleth of Section 102 and 109 being limited to internal affairs to argue that the underlying claims regulated by the forum selection charter provisions must be internal corporate claims, as defined, for example, in Section 115, or state law claims governed by the internal affairs doctrine. But this argument goes a step too far.

Section 102(b)(1) says that the charter provisions themselves may regulate, for example, the affairs of the corporation and the

management of the business. This enables a corporation to regulate where its principals may be subject to suit by stockholders, but it does not, it does not, designate what kinds of stockholder-related claims a forum selection charter provision may regulate.

And there's certainly no basis in the language of the statute to say that in regulating where a stockholder brings certain claims, so long as they arise in his or her capacity as a stockholder or affect the relationships between and among stockholders, officers, directors, and other corporate constituents, that those claims have to be based in state law as opposed to federal law. That would be an artificial limitation, imagined from whole cloth.

Nothing in Section 102, nothing in Section 102, suggests that affairs of the corporation must be synonymous with internal affairs, that is, claims governed strictly by Delaware law, as the plaintiffs argue.

Section 102 permits the regulation of things that are intra-corporate or intra-entity as opposed to inter-corporate relationships with other corporations or with suppliers or customers, which we

know are governed by more than just Delaware state law.

Indeed, Your Honor, the well-known ATP case, which is well known to Your Honor and everyone in this room, illustrates the point I want to make.

Now, I know Your Honor is familiar with it, but if you'll indulge me, ATP involved a fee-shifting bylaw adopted by a nonstock corporation that shifted fees broadly for claims brought by former or current members against the league. That is, the bylaw didn't purport to regulate specific types of claims, but, rather, by its terms, it regulated any claims between owners or members and the corporation itself.

Now, the case originated in the District Court of Delaware when certain existing members brought fiduciary duty and antitrust claims against the league.

Now, after the league prevailed on those claims, the District Court refused the league's effort to enforce the fee-shifting bylaw, finding that it was preempted under federal antitrust law.

The Third Circuit, however, vacated the District Court's order, holding the District Court

should have decided whether the bylaw was valid as a matter of Delaware law before reaching the preemption question.

The questions regarding validity of the bylaw were then certified to the Delaware Supreme Court, which held the bylaws facially valid.

Now, tellingly, tellingly, the Delaware Supreme Court did not pause over the fact that the bylaws would be shifting fees for claims that were not grounded in state law, and indeed, were being used there to regulate litigation arising from antitrust claims as well.

Instead, the Court, the Supreme Court of Delaware, described those bylaws as governing what is referred to as intra-corporate litigation, keying off the fact that it would regulate claims between or among current and former members and the league, and concluded that the bylaw was valid as a matter of Delaware law.

Now, to quote from ATP, "A bylaw that allocates risk among parties in intra-corporate litigation would also appear to satisfy the DGCL's requirement that bylaws must relate to the business of the corporation, the conduct of its affairs, and its

rights or powers or the rights or powers of its stockholders, directors, officers or employees."

So we think ATP illustrates precisely the distinction between the panoply of claims and litigation based on a corporate relationship which is broadly considered intra-corporate or intra-entity, and the narrower universe of Delaware's state law claims that are subject to the internal affairs doctrine or internal corporate claims, as defined in Section 115, that must be allowed to be brought in Delaware.

Moreover, the Supreme Court didn't consider whether allowing a Delaware corporation to regulate those types of claims would run afoul of public policy, nor did it purport to address the issue of preemption, even though that question was front and center. Instead, it answered the narrow question of whether they were valid as a matter of Delaware law.

And so at the end of the day, given Delaware's strong public policy allowing corporations to privately order their affairs, this Court should follow the natural and time-honored tradition of reading Section 102(b)(1) permissively as opposed to restrictively.

Moving on to number two, unable to point to language in Section 102(b)(1) that supports his position that the federal forum provisions are invalid, plaintiff instead relies heavily on then-Chancellor Strine's opinion in Chevron as somehow undermining the validity of the federal forum provisions. But as someone who lived through that case, Chevron does just the opposite.

Plaintiff ignores the fact that Chevron spoke positively about the ability of corporations to privately order where stockholder-related suits can be brought. It broadly stands for the proposition that Section 109 is permissive, not restrictive.

Specifically, the Court emphasized that the bylaws there related to the conduct of the corporation insofar as they channeled the internal affairs cases into courts of the state of incorporation. The provisions also related to the rights of stockholders insofar as they designated where current and former stockholders could bring claims that implicated the rights and powers of the stockholders as stockholders.

The Court found these process-oriented

bylaw provisions were expressly permitted by Delaware law. The Chevron court held that the bylaws there regulating internal affairs types of claims easily, easily, met that standard.

In view of the Court's comments and holding that the forum selection bylaws were valid, we find it ironic that plaintiff relies so heavily on Chevron to argue that the federal forum provisions, a slightly different flavor of forum selection provisions, are invalid.

And tellingly, they don't point to specific language in Chevron that supports this argument. Rather, they string together a series of tidbits from Chevron and other cases to concoct an argument that the federal forum provisions are invalid.

For example, he focuses on the Chevron court's comment that forum provisions governing slip-and-fall cases or commercial contract disputes would be beyond the statutory language of 109(b).

He takes this comment, along with Your Honor's observation in Activision that securities claims are tort claims that are personal in nature, to argue that Chevron holds that forum selection charter

provisions cannot regulate securities claims. But the Chevron court did not address the propriety of forum selection provisions regulating securities claims.

In fact, Your Honor, the argument that was made to Chancellor Strine I believe in this very courtroom or the one nextdoor to this courtroom was all about how these bylaws would preclude federal securities claims being championed in federal courts. And Chancellor Strine rightly thought he needed to go out of his way in that opinion, making clear that these bylaws would not interfere at all with the vindication of federal rights and federal claims under these federal securities laws.

That was the thrust of what he was trying to do in that opinion, was to respond to Mr. Hanrahan's constant argument that these bylaws were so broad, they would preclude these federal securities claims from ever being brought in a federal court. That's the whole gist of that opinion, Your Honor.

In fact, Securities Act claims are fundamentally different from the kinds of slip-and-fall and commercial cases that were mentioned by Chancellor Strine because Securities Act claims

are, by definition, tied to a plaintiff's stock ownership, as we explained in our briefing.

The federal forum provisions thus necessarily involve and regulate the interactions of managers and stockholders in their capacities as such.

And likewise, as Your Honor well knows, Activision addressed an entirely distinct and separate question relating to the alienability of claims when shares are sold. And that case isn't apt here.

Indeed, when you read Chevron as a whole, the clear takeaway from that case is that Delaware law broadly enables corporations to privately order their affairs and regulate procedurally the manner in which its constituents interact.

The reasoning of Chevron applies with full force here.

Number three, plaintiff relies on Section 115 to argue that the forum provisions here are invalid. We've said as much as we need to say in our papers, and I'm not going to take more of Your Honor's time on it. Let me just note that there is nothing in the text of Section 115 or it's legislative history that suggests that it enumerates the one and

only type of permissible forum selection bylaw or charter provision. And so there's no reason to imply or read that kind of limitation into the clear textual language and the intention of which is made very clear in the synopsis to the legislation. And so for that reason, 115 has no application here.

Number four, the plaintiff ultimately resorts to public policy concerns as a reason why Your Honor should invalidate the federal forum provisions.

Now, to be clear, the plaintiff doesn't actually claim that the provisions run afoul of any federal statute or are preempted by federal law. He concedes at pages 17 and 18 of his answering brief that the dispositive question for this Court is whether these provisions are authorized by the DGCL in the first instance.

Rather, he claims that the forum provisions are somehow inconsistent with public policies reflected in the federal statutes and that they would, therefore, if you upheld them, contravene Delaware's so-called stay-in-your-lane public policy.

Now, I well understand and appreciate the Delaware courts' emphasis on comity to our sister courts and respect for the federal courts, but this

concern is not relevant to the question posed here.

First of all, first of all, for the reasons we've stated in our papers, there is nothing inconsistent with the federal forum provisions and the fact that the federal securities statutes recognize state courts as an available forum for claims brought under the Securities Act.

Federal courts also recognize in cases such as Rodriguez the ability of parties to designate the appropriate forum for hearing Securities Act claims through a forum selection provision. So the policy reflected in the federal securities statutes must necessarily include those lines of cases.

Plaintiff fundamentally doesn't explain why the forum provisions should be treated differently than a contractual forum selection provision, which would be fully enforceable and not contrary to any public policy reflected under federal law.

And as we know, Chevron itself made clear that charters are contracts between stockholders and the corporation. And forum provisions, like the federal forum provisions, should be analyzed like any other contractual forum selection provision.

Let me put it even more forcefully. We actually believe, we actually believe this conclusion is compelled by controlling United States and Delaware Supreme Court precedent.

In Rodriguez, the United States Supreme Court allowed for arbitration of a federal securities claim even though the federals securities laws nowhere provide for arbitration. It follows, a fortiori, that if a forum selection clause designating a forum that is not contemplated by the text of the securities statute is permissible, then a forum selection clause designating a forum that is clearly contemplated by the statute must be also permissible.

Indeed, if federal policy is as the plaintiff claims here, then Rodriguez is wrongly decided.

And there's more. In Ingres, the Delaware Supreme Court explained that forum selection clauses are presumptively valid and that Delaware follows the rule articulated by the United States Supreme Court in The Bremen.

So unless plaintiffs can demonstrate that it's unfair to litigate a federal claim in a federal court, of which there are 95 throughout this

great land, or that there is an unreasonable burden in suing in their local district court, or that the procedure by which they actually purchased their shares, subject to the forum selection clause, was in any sense coercive, controlling Delaware precedent would view this forum selection clause as presumptively valid.

Any opinion holding that the forum selection provision at issue is invalid would, therefore, in our view, with respect, be inconsistent with controlling United States and Delaware State Supreme Court authority.

But second, and in any event, it's not really clear to me how the federal forum provisions stray into the lane of federal law. We're talking about provisions, remember, that enable corporations to channel federal securities claims governed by federal law into federal courts. We're not talking about funneling cases into Delaware or allowing Delaware courts to focus on cases beyond their ambit.

So it's really not clear how exactly these provisions would undermine Delaware's purported stay-in-its-own-lane policy. The argument that Delaware is usurping federal power just doesn't make

sense in view of the fact that these provisions channel federal law cases into federal courts.

And that raises for me, Your Honor, an important point that I think seems to have somehow gotten lost in all of this, which is that plaintiff wants to ignore the very common sense, practical, real-world reason why a corporation would want to adopt these provisions.

It makes logical sense that a corporation would want federal claims based in federal law to be heard in federal courts that had the most experience with those types of claims. What we in Delaware here always used to refer to in our own case as our comparative advantage.

The federal forum provisions also help address the very real problem of multi-forum litigation. The recent submission by the plaintiff's counsel regarding the complaints filed by stockholders of Blue Apron dramatizes this point.

There, you have one case filed in a federal court in August of 2017, and a follow-on suit filed in the New York State Court a little later, about a year later, in August of 2018, asserting almost identical claims under the Securities Act in

both federal and state court. It's not unreasonable that a corporation would not want to waste stockholder dollars on litigating the same claims in multiple forums.

And I note also that they admit in their brief, their answering brief at page 5, Note 15, they identify a number of cases where identical, identical, securities law claims were filed in both state and federal courts as well as this recent Blue Apron submission, which, again, shows that the very problem that these provisions are designed to alleviate and the very problem that the Chevron forum bylaws were meant to alleviate, is multi-forum litigation that cannot possibly be in the interests of diversified investors.

So we just don't see how federal courts hearing federal securities claims is a perverse thing.

Next, I think plaintiff doesn't really explain why the stay-in-your-lane policy should override Delaware's stated public policies. There are two of those that have a long history in this state. One is that corporations should be empowered to privately order their affairs, and the other one is

that forum selection provisions are presumptively valid and enforceable. Both of these important policies, which have been repeated in legions of cases, are implicated here and should not be overlooked.

And finally, plaintiff asks, Well, if the federal forum provisions are validated, where will it all end? Where will it all stop? Will it lead to provisions that limit federal securities claims to arbitration or provisions governing other types of claims?

Well, Your Honor, those are all interesting questions, but they're not the ones before Your Honor. They're for another day.

That's the same kind of argument that was made to Chancellor Strine in Chevron. A parade of horribles about what-ifs, what might be. And he, likewise, concluded, That's not before me. I don't need to reach it. That's for another day.

Now, we could imagine if we wanted to a scenario where a different type of forum provision like one purporting to regulate tort or commercial contract disputes could exceed the scope of 102(b)(1). We could imagine that. We could imagine a scenario

where a provision could be held by a federal court to be preempted by federal law.

Now, a court down the road could conclude that a charter provision subjecting certain claims to arbitration that might affect the substance of the claim and, thus, take it out of the procedural realm discussed by the Chevron court and the Rodriguez court -- which, by the way, Rodriguez referred to the arbitration there as another form of federal forum selection. But again, that's a dispute, but it's a dispute for a different day. And the Court can acknowledge that in its ruling here.

Certainly, a holding that the federal forum provisions are valid wouldn't preclude this Court, or any other court, for that matter, from finding that other forum selection provisions could be invalid.

And we recognize 102(b)(1) is not unlimited, but the question before Your Honor today is limited to the federal forum provisions. And they do not run afoul of any Delaware law.

So for all the reasons I've mentioned and those set forth in our brief, Your Honor, we think you should grant our motion for summary judgment and

deny the plaintiff's.

With that, I've concluded what I wanted to say in my prepared remarks, but I'm happy to answer anything Your Honor might ask in the way of questions.

THE COURT: In your textual analysis, you jumped from "any provision" to the "if such" language that appears after the semicolon. Are there any of the prepositional phrases that you think are applicable to this bylaw?

MR. CHANDLER: Let me see what those are, Your Honor.

I don't think so. No, I don't think that changes the analysis, Your Honor, in terms of how the breadth of the statute applies, in terms of intra-corporate litigation-type claims.

THE COURT: I guess what I'm looking at is it's not just any provision. It's any provision for one of these types of things. In other words, the prepositional phrases effectively act as limiters on the scope of the type of provision you can have.

I take it that's not how you're reading it.

MR. CHANDLER: Well, there are ways in

which you could use that to limit the definitional frame. You could. But I've never seen any decision that has done that or that has in any other way sort of tried to use that to encapsulate or limit or constrain the breadth of the provision, Your Honor.

THE COURT: So you don't think, for example, that you would need to demonstrate that a valid provision under (b)(1) would need to pertain to the management of the business or the conduct of the affairs or the creating, defining, limiting and regulating, et cetera?

MR. CHANDLER: I think you would have to show that in some way, the provision related to the conduct of the affairs of the corporation, or that it in some way related to the management of the business. I do.

THE COURT: So which ones does your bylaw work with?

MR. CHANDLER: Both of them. Both with the management of the business and for the conduct of the affairs of the corporation and any provision that -- I'm sorry.

THE COURT: I was actively listening, which I probably shouldn't have done.

MR. CHANDLER: And any provision that limits, regulates the powers of the corporation, or the directors, or the stockholders.

So this provision does all of those things. It affects the conduct of the affairs of the corporation. It delimits or regulates the powers and rights of the corporation. Specifically, the rights of stockholders to assert Federal Securities Act claims are regulated only in the procedural sense that they are steered or channeled to a federal court.

THE COURT: All right. So if we take them one by one, let's do the last one first. So the first one is that it regulates the powers of stockholders to sue. Fair?

MR. CHANDLER: Fair.

THE COURT: Okay. Now, let's move to conduct. What is the conduct of the affairs that it's addressing?

MR. CHANDLER: So it's addressing the corporation's ability to decide where it would like best to be sued on any claims by stockholders with respect to a certain issue.

The underlying issue doesn't matter. In our view, it just matters that the corporation

believes that it's more efficient for it and its stockholders to forge an agreement on where all of its legal proceedings ought to be concentrated. That's the conduct of the business' affairs. So the affairs includes litigation as well as the business of the company.

THE COURT: And is it the same answer on management?

MR. CHANDLER: It is. The management of the business there, the business, not only is it in the business of producing widgets, for example, but it's managing litigation that grows out of the production of the widgets or managing the relationship of the stockholders in the corporation with respect to the duties or claims that arise out of that relationship, that somehow come out of the relationship between those corporate constituents: Stockholders, directors, and the company.

THE COURT: And do you view management of the business and for the conduct of the affairs as the same as, less than, or broader than the business and affairs of the corporation in 141(a)?

MR. CHANDLER: I think they would be interchangeable in my mind, Your Honor.

THE COURT: So you said it would be easy to imagine provisions that would go beyond (b)(1). What are some that are easy for you to imagine?

MR. CHANDLER: Well, any ones that are sort of what I'll call external to the corporation. You couldn't adopt bylaws or charter provisions I think that had some effect on those external to the corporation.

So the classic example is the one that Chancellor mentioned in Chevron, a slip-and-fall case. They're not going to be able to govern that with some kind of bylaw, even though the person being injured perhaps is a stockholder.

So things that are external that affect the relationship of the company to other companies, to its customers, to its suppliers, vendors, those would be outside of what I would call the intra-entity or intra-corporate relationships that are fully manageable within the corporate contract.

THE COURT: If you take your broad view of management, why isn't there the same interest in choosing where those types of claims are brought against the corporation and picking the forum for

those?

MR. CHANDLER: I'm sorry, Your Honor. I didn't hear --

THE COURT: Sure. If you take your broad reading of what it means to have management of the business or conduct of the affairs and you accept that that includes selecting where litigation happens, why isn't that interest, why isn't that level of analysis, equally applicable to litigation against the corporation involving those subjects?

MR. CHANDLER: Involving what I call those external subjects? I guess, Your Honor, it's just that in terms of what I view as sort of the legal impracticality of it. Because you're talking about using the corporate contract, that is, the charter or the bylaws, to somehow regulate things that are external to the corporation. And they aren't part of the relationship. They aren't the natural relationship which we are enforcing as a contractual thing between stockholders, directors of the company and the State of Delaware.

And so I don't know how you would do it other than, for example, with your suppliers or vendors or outside corporations, you would engage in

that kind of contractual thing in the contracts that you enter into with them. So if you're entering into a supply contract, that's where you would enter into the forum selection provision, choosing the forum that you wanted to litigate in.

THE COURT: That implies to me, though, that there's some additional limitation on the concept of management of the corporation or conduct of the affairs. In other words, it has to be management of the corporation or conduct of affairs that also relates to these types of internal affairs concepts. Yes?

MR. CHANDLER: It might. It might. But it wouldn't regulate the powers of stockholders. I mean, that's one of the other things I think you're going to have to go back to, is that these provisions refer specifically to limiting, restricting or regulating the --

THE COURT: I understand you want to move off this. I don't want to move off this yet.

MR. CHANDLER: Okay.

THE COURT: I'm still trying to focus on the idea that management and conduct of the corporation includes selection of a forum for

litigation.

And what I heard you say in response to that was that it also has to involve the internal constituents to the corporate charter, the corporate enterprise.

And so what I want to see if we're on the same page on is whether that means that it's not just management of the business that you can include these things, but it's management of the business to the extent that those also involve these internal issues. Is that fair?

MR. CHANDLER: Correct. I think I'm trying to say the same thing, although you're saying it better and clearer.

THE COURT: I don't know about that.

All right. So as to -- I also heard you say, though, that you didn't think, though, that you could even limit claims involving people who were stockholders. So could you have a charter provision that would say that if you are a stockholder and you want to sue the corporation on any type of claim, that you have to do so in Forum X?

MR. CHANDLER: Well, you might be able to do that, Your Honor. I mean, but the good thing is

that's not a question that's before Your Honor, that kind of provision.

I mean, the Supreme Court of the United States has said in Carnival that you can pick one forum. There have been federal courts that have applied forum selection provisions to securities claims that have enforced forum selection provisions for a single district court, a single court, with respect to stockholder claims. So I think you might be able to do that. But fortunately, it's not really in front of you.

THE COURT: But you think in terms of the limiting principles that constrain (b)(1), that would be something that was possible?

MR. CHANDLER: I think it would be possible to draft that kind of provision. I do. I think there are potential problems to the extent that it might be viewed as attackable on grounds of it's limiting your substantive rights in some way by limiting it to a single forum.

But as long as you're dealing with stockholders as stockholders, I think that you can try a provision like that, and under 102(b)(1), might be able to defend -- you might be able to defend it under

102(b)(1).

THE COURT: I don't want to insert into the hypothetical the idea of stockholders as stockholders. I want to simply have the idea that we are dealing with stockholders and we are dealing with the type of claim that someone who is a stockholder might be able to bring.

So it would be the same type of move that I see in, for example, people who get option grants where they say, As a condition of accepting this option grant, you have to bring any and all claims relating to your employment under any type of federal or state statute or anything under the sun in arbitration or in Forum X or things like that. So the claim itself relates to the employment. The vehicle is the option grant.

So what I'm asking is, could you have that type of breadth where the person's link to the corporation was through some type of stockholder status but the claim was not necessarily tied to stockholder status?

MR. CHANDLER: I think that, frankly, Your Honor, would be a harder move to make because I think it needs to have some relationship to your

status and your capacity as a stockholder. So the further you move out on the ledge beyond that, then I think it becomes a more arguable proposition.

THE COURT: So how would you frame the requisite test for the appropriate nexus between stockholder status and the claim?

MR. CHANDLER: I think any claim that arises within that corporate context of under 102(b)(1), what it says, the management of the business, the affairs of the corporation, and any limitations on stockholders acting in that capacity as stockholders, that's the test. And as long as all you're doing is affecting that right or that duty or that obligation in a procedural way and not in a substantive way, then I think that's what 102(b)(1) envisions.

And I think, frankly, that's why corporations come to Delaware and seek to incorporate here, is because of the breadth of that provision, because --

THE COURT: You can't think that it has to have some tie to Delaware law, though. You agree with that. Right?

MR. CHANDLER: I'm sorry. It has to

have some tie to Delaware law?

THE COURT: The claim, yeah. The nature of the nexus. Again, I want to explore the nature of the nexus.

MR. CHANDLER: I don't think the underlying claim -- I don't think the substantive underlying claim has to have some tie to Delaware. It doesn't have to be a Delaware law claim. The federal statutes -- there are lots of federal statutes, disclosure laws, proxy rules, that govern Delaware corporations. Those give rise to claims to stockholders based on their status as stockholders. And I think that's a legitimate subject under 102(b)(1) for companies to regulate procedurally but not substantively.

THE COURT: That's what I'm trying to understand.

So no matter what the source of the law, whether it's a charter-based contract right or DGCL provision or anything like that, you don't think there needs to be any Delaware aspect of that, as long as it is a type of claim that somehow relates to someone's ownership of stock?

MR. CHANDLER: Correct. That's my

view, Your Honor.

And I think ATP proves my point because the Supreme Court didn't draw any distinction like that either. And there, they are running trust claims as well as fiduciary duty claims. And they refer to them all as intra-corporate claims arising out of the relationship between the company and its stockholders, or its members, in that case.

THE COURT: Do you think that had anything to do with the fact that it was a facial challenge as opposed to a more specific, like, as-applied challenge? Like if someone had parsed between those two, do you think it still would have come out the same way?

MR. CHANDLER: It may have, Your Honor. I don't know for sure. That's the way the Supreme Court approached it. I realize it was a facial challenge. I realize it was on a certified question basis, but they certainly didn't pause over that language at all when they wrote the opinion.

THE COURT: So I know we're not arguing about 109, but 109 includes the additional word of "employees" that 102 doesn't. So it talks about being able to include bylaws "relating to the

business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees." You get that additional hook.

What's your view as to whether some type of forum selection provision, be it in a charter or a bylaw, could regulate all claims no matter what the source possessed by employees?

MR. CHANDLER: All claims possessed by employees, would that include claims that might arise outside of the corporate context?

THE COURT: Anything under the sun, let's say. In other words, I'm using the same limitation that you've been using, using the word "stockholder," and I'm simply substituting in the word "employees."

MR. CHANDLER: Mm-hmm. I think my view would be that that's what the provision gives you the power to do. And so you would be -- I think there is an argument you could regulate that relationship in that way, under a bylaw.

But I'm glad that's not the question Your Honor has to face today.

THE COURT: Yeah. But what I think I

probably do have to figure out is, and ultimately it will probably be the Supreme Court that does it, some type of standard that explains what the nexus is. And that's what I'm trying to think about and figure out.

What is the -- you've obviously said you don't have to worry about the next case or the case after that or even the one after that, but the nature of precedent is that it gets built on. And so the question in my mind is, what is the appropriate framing of this connection between stock ownership and the claim such that it can be regulated in the charter or in the bylaws?

MR. CHANDLER: So if it's only a relationship that is internal to the company, it can't exist other than -- you know, it arises from something that some body of law, federal law or state law, gives to those who are constituents of the company, like a stockholder, then I think that's the kind of relationship, and the right or the claim or the litigation arises out of it, that gives you the nexus, that gives you the connection to the corporate contract.

THE COURT: But that's why the employee analogy shows the breadth of that move. As

long as the breadth of the move is just -- or as long as the breadth of it is simply internal affairs narrowly construed to mean Delaware law claims involving rights under the charter, rights under the DGCL, et cetera, I understand the nexus.

As soon as the move becomes "or any other source of law that you happen to be able to assert because you are a buyer, seller, holder, or owner of stock," that's when the vistas open. And I think the employee example brings home how much the vistas open when you do that.

MR. CHANDLER: And, respectfully, Your Honor, that vista is already open, because I can assure you, if you check the public records of charters of public companies, Delaware companies, they have charter and bylaw provisions that are replete with references to federal obligations and federal laws and state laws. They're everywhere.

And I think that's because those laws affect the relationship, just like our internal laws, our Delaware laws do. And so the internal affairs doctrine and the internal corporate claims arising under Delaware law is really just a subset, I think, a subset of the overall universe of potential litigation

claims that can be brought against the company arising out of -- it all arises, however, out of that relationship between those constituents that are mentioned in 102.

THE COURT: All right. Thank you.

MR. BONGIORNO: Good afternoon, Your Honor. Mike Bongiorno on behalf of the Blue Apron defendants.

In the spirit of staying in one's lane, I'll try to stick with just a few very minor points as the plaintiff described them, although I think they're certainly important to my clients, relating to two issues that were talked about earlier this afternoon by Mr. Fleming: ripeness and the savings clause.

And I'll just say this, that the plaintiffs say that it's ironic that Blue Apron is challenging ripeness since we're the defendant who is facing securities claims in both federal and state court. I actually think it's not ironic at all, and I think it's strange that the plaintiffs are pointing to that in their favor. In fact, what that shows is why the case against Blue Apron is not ripe.

That, unlike cases that the plaintiffs

cite where ripeness is found despite the fact that there's no current dispute on the provision in play, and the Solak case sort of sets out that doctrine pretty well, as cited by the plaintiffs earlier today, the standard is whether or not the provision is having a substantial deterrent effect such that the Court should address it now, rather than wait until there's an actual dispute over it.

There's obviously no substantial deterrent effect that Blue Apron's provision is having on shareholders who want to bring state law Section 11 claims since it's happened. And the notion that -- and it's actually happened twice.

Just to clarify, there were not one but three federal cases that were brought. And there were not one but two state cases that have been brought.

The fact that the three federal cases have been consolidated into one -- maybe there were more than three cases. There were cases brought in three different jurisdictions: the Eastern District of New York, the Southern District of New York, and the District of New Jersey. Now we have one federal case consolidated in one courthouse in front of one judge.

In state court, Blue Apron a year later got one Section 11 claim and then another. The second one hasn't even been served yet, but it is certainly demonstrating a lack of a substantial deterrent effect that the bylaw is having.

Nonetheless, Blue Apron hasn't moved to dismiss it under the bylaw. It hasn't removed it.

We heard a couple things about removal today. We heard that this state case would be removed and then under the -- not the bylaw, but the charter provision, Blue Apron would remove it. The plaintiffs would have to seek to remand it. It would be very expensive and have this, you know, terrible effect.

Then we heard later the accurate statement, which is that these Section 11 claims can't be removed. And the time for the case to be removed is long past, anyway, at least the first state case.

So I say all of that just to say simply there is nothing going on with this provision right now that would require the Court to look at it and decide whether or not it's valid and could be enforced, because it's not deterring people from bringing claims. They are. Blue Apron has yet to invoke it. If it does, maybe that would be a

different story, but there's no reason to assume that it will. And so we're dealing in the theoretical, and the theoretical is not appropriate for a declaratory judgment.

And the second issue --

THE COURT: Let me just interrupt you, because I will forget this.

MR. BONGIORNO: Certainly.

THE COURT: And you may have told me this in your briefs, and I apologize if I don't remember it.

So is it your view that you can't invoke this bylaw in the state case because of the antiremoval provision, or do you feel like you have some option?

MR. BONGIORNO: We certainly don't take that position, Your Honor. That would sort of eviscerate the charter provision itself if we couldn't invoke it.

My point is that we haven't invoked it and it hasn't created a substantial deterrent effect, and therefore, there's no ripeness --

THE COURT: Not necessarily because, I mean, we don't know what the base rates would be. For

all we know, you guys could have had a hundred cases but for this bylaw, or you might have had cases by different groups of plaintiffs. We just don't know what the base rate is. But we can agree that we're in a situation where you guys have been sued. So let's set that aside.

To reiterate, let me say it back to you, and you can tell me if I've got it right.

You believe that you could remove the state court case based on the bylaw -- I mean, based on the charter provision.

MR. BONGIORNO: No, Your Honor. We couldn't remove it. We could move to dismiss it, but we couldn't remove it, because the case is not removable.

THE COURT: All right. That's what I was trying to understand.

MR. BONGIORNO: I apologize.

THE COURT: So you would bring a motion to dismiss on the grounds that it was filed in the wrong forum. You wouldn't remove it. And that would harmonize the two provisions.

MR. BONGIORNO: Yes, Your Honor.

THE COURT: I'm with you now. Thank

you.

MR. BONGIORNO: And the only other thing I wanted to add, Your Honor, is on the savings clause, they say the savings clause is completely irrelevant. It does distinguish us from the other two defendants. Our provision is only applicable to the extent permitted and allowed under Delaware law or applicable law.

And therefore, there's no reason to invalidate our provision because our provision will not extend beyond whatever this Court or, as the Court may have suggested, ultimately, the Supreme Court decides are the parameters of what is an appropriate forum charter provision or bylaw in this context.

So invalidating this is going to remove -- would remove something from our charter that may be valid up to a point that we don't know the parameters of as we sit here today. Or certainly the parties don't.

You know, we will await and see how this Court rules, and we will abide by it. And if the Supreme Court speaks on the matter, we'll abide by that, of course. And the bylaw or the charter provision in this case is flexible enough to

accommodate that and, therefore, that does affect, I think, the ripeness of it, as well as the validity of it.

THE COURT: What is left if the plaintiffs are right?

MR. BONGIORNO: Well, if the plaintiffs are right on all fours and it is not valid under any circumstance for any reason, then there may not be anything left. But we don't know that. The Court may know that, but the parties don't know that.

And we need to wait and see how this Court rules, and if it's appealed, how the Supreme Court rules, et cetera. And it may be that there's something in between our position and their position on this issue, in which case our charter provision is valid, at least to some degree.

THE COURT: What do you think the intermediate provision position would be?

MR. BONGIORNO: I can't say for sure, Your Honor, because I don't know. But there are points made in their brief about how this isn't an intra-company dispute, but if -- or provision. But if it were, it would still be invalid because it doesn't allow the cases to proceed in Delaware.

I know that's not the plaintiffs' position, but it was at least a hypothetical they put in their brief. To which we would say, Okay, if that is correct, then that would save our provision because then it would mean that cases could be brought in federal court or in Delaware state court, but not in other state courts.

So I don't think that's where this case is headed, but I suppose it's possible. And the parties have thrown that out there as a possibility. That's one. I mean, could I, I suppose, imagine others? We need to wait and see.

THE COURT: Thank you.

I should have said I had the sense that you were done. If there is another point you want to make ...

MR. BONGIORNO: That was the correct sense, Your Honor.

THE COURT: Thank you.

MR. FLEMING: I'll try to be brief.

First, the question of exactly who this reaches, I did hear a suggestion that there's no way these provisions could ever reach the holder of a debt security. If you look at page 18 of our

complaint, which is paragraph 47, it gives the text of the Stitch Fix and Roku provisions.

And what it says is that "Any person or entity purchasing or otherwise acquiring any interest in any security of the Company shall be deemed to have notice of and consented to the provisions of this Section ...." And then there's similar language in the Roku provision. Both refer to "any security," not "any purchaser of common or preferred stock."

I don't think there's any dispute that the Securities Act itself does give purchasers of debt securities claims. So I don't want to invite this Court to reach a ruling where claims from -- provisions applying to stockholders are valid. Claims applying to purchasers of debt securities maybe are not. That's not what I'm suggesting.

But the point is that the type of claims that are described by the Securities Act are claims that belong to the purchasers and sellers of securities, not -- who are often stockholders, but are often not at the time that they file suit.

Then there was a significant discussion of the ATP case, which was the first time,

really, that we're hearing much discussion of ATP. I looked back, and it wasn't in any of the briefs filed by Stitch Fix or Roku, which I think there is probably a good reason for that.

First of all, this idea that ATP endorsed a provision going beyond internal matters, it wasn't even dicta. It was sort of implied by the fact that the Court didn't mention this limitation in the course of answering a handful of certified questions.

Also, if you look at the council memo that was submitted by the Stitch Fix and Roku defendants, on the last page, the council says that one of the purposes of Section 115 was to limit ATP to its facts. And of course, ATP involved a nonstock membership corporation.

So there is a very different interaction, I think, between a nonstock corporation and a traditional public corporation with significantly different overlay in terms of what the federal securities regime looks like.

With respect to Rodriguez, two important things to keep in mind with Rodriguez. One, it didn't involve claims between stockholders and issuers. It involved a contract that was reached

between a retail brokerage and customers of that brokerage.

And secondly, there is the additional federal overlay of the Federal Arbitration Act. This comes up a lot, obviously, in consumer class actions. This has been a live dispute in the last decade or so. There is a strong federal policy favoring arbitration, and that played a significant role in Rodriguez. There is no comparable -- you know, that policy obviously is not implicated here.

And then, lastly -- and we would, I think, agree that if a sophisticated stockholder wanted to reach a separate standalone stockholders' agreement that provided for a provision like this, that would be fine. The question is, what does the DGCL actually authorize? It's the third leg of the contract that's formed: the DGCL, then the certificate of incorporation, then the bylaws. I think it would be a different scenario with a stockholder agreement.

Finally, there was a bit of back-and-forth in the other presentation about whether -- once someone is a stockholder, could you then use their status as a stockholder to deal with any type of claims -- or employee -- in the context of

bylaws?

And Chevron answers this question. The example was given about, what about tort claims by someone who happens to be a stockholder? And Chevron says, no, that that would go beyond what is appropriate for a bylaw to regulate.

So those were the things that jumped out at me.

Very briefly, I guess, on ripeness, the deterrent effect, the mere fact that someone filed isn't the end of the story. Perhaps they wouldn't have agreed to stay but for this provision.

It's also the case that the discussion about deterrent effect comes up in cases where no litigation has actually been filed. I don't think it's the only way that you can show a claim is ripe at the point that you have our client who's an absent member of the putative class in that state court litigation.

I don't know that we need to get into sort of hypotheticals about what the deterrent effect might be. I think the fact that -- it seems likely that you will see a motion to dismiss filed by the Blue Apron defendants on this ground at some point.

So I don't know that speculation about deterrent effects is the best way to resolve the ripeness question there.

Unless the Court has other questions, I don't have anything else. Thank you.

THE COURT: Last word? We have cross-motions, so I think you're technically entitled to it.

MR. CHANDLER: I'm reluctant to take any more of your time, Your Honor. We all appreciate the fact that you've given us this much time.

I'll make two quick points.

On the debt claim issue, that's an as-applied challenge. That's not a facial challenge.

As to Rodriguez, there are lots of federal cases, we cite them in our brief, that have applied forum provisions.

Sending securities claims cases to a particular federal court like the Southern District of New York, that's not unusual. That's been done repeatedly. They're cited in our brief. And we can provide you with many others if you want them.

I'm going to take one last stab, Your Honor, one last stab at a limiting principle for you.

And it goes like this. The syllogism kind of goes like this. You are a stockholder. And whatever rights, claims, or powers that are being regulated exist only because and solely because of your status as a stockholder. If so, then the power to regulate those rights or those powers, procedurally only, exist if it has to do with the affairs of the company or the management of the business or if it's regulating your powers or rights as a stockholder.

So in your capacity, only in your capacity as a stockholder, does that right or claim or ability to sue arise. It only arises because of that. That's the limiting principle that I would apply.

THE COURT: All right.

MR. CHANDLER: Thank you, Your Honor.

THE COURT: I appreciate all of your presentations and helpful arguments. I suspect that this will ultimately be decided by folks senior to me, but I will take this under advisement and give you something in writing that will get you on your way.

Thank you, everyone, for coming in. I appreciate it.

MR. CHANDLER: Thank you, Your Honor.

MR. FLEMING: Thank you, Your Honor.

VARIOUS COUNSEL: Thank you, Your Honor.

(Court adjourned at 3:24 p.m.)

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CERTIFICATE

I, JEANNE CAHILL, RDR, CRR, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 77 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, Delaware, this 3rd day of October, 2018.

/s/ Jeanne Cahill

Jeanne Cahill, RDR, CRR
Official Chancery Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter